

Assembly Bill No. 198

Passed the Assembly September 12, 2007

Chief Clerk of the Assembly

Passed the Senate September 11, 2007

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2007, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 17942 of, and to add Section 19394 to, the Revenue and Taxation Code, relating to limited liability companies, to take effect immediately, tax levy.

LEGISLATIVE COUNSEL'S DIGEST

AB 198, Committee on Budget. Income taxes: limited liability companies: apportionment.

The Personal Income Tax Law requires every limited liability company subject to a specified tax to pay annually to this state a fee equal to specified amounts based upon total income from all sources reportable to this state. That law defines total income as gross income, as defined, plus the cost of goods sold, as specified.

This bill, for taxable years beginning on and after January 1, 2007, would clarify that total income from all sources reportable to this state means gross income, as defined, plus the cost of goods sold, as specified, derived from or attributable to this state within the meaning of specified provisions of the Corporation Tax Law relating to apportionment and allocation, as provided. This bill would make legislative findings and declarations regarding the necessity for the equitable treatment of limited liability companies.

Existing law provides, for the purposes of specified taxes, that if any deduction, credit, or exclusion administered under the Personal Income Tax Law or the Corporation Tax Law is finally adjudged discriminatory against a national banking association under a specified federal law, or is for any reason finally adjudged invalid, or discriminatory under the California Constitution or the laws or Constitution of the United States, the tax shall be recomputed by the Franchise Tax Board, as specified.

This bill would provide that if a fee imposed under a specified section is finally adjudged as discriminatory or unfairly apportioned under the California Constitution or the laws or the Constitution of the United States, the fee of a disfavored taxpayer that files, or has filed, a timely claim for refund asserting discrimination or unfair apportionment shall be recomputed by the Franchise Tax Board for the taxable year in question, as of the time of allowance of the recomputation, only to the extent necessary to remedy the

discrimination or unfair apportionment not otherwise relieved by existing law, and that the amount of the fee as originally computed shall be subject to the provisions relating to original computations.

This bill would make findings with regard to actions for refunds of fees.

This bill would take effect immediately as a tax levy.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that the changes made by this act with respect to Section 17942 of the Revenue and Taxation Code are necessary to provide for the equitable tax treatment for limited liability companies in light of the following:

(a) The California Limited Liability Act (Ch. 1200, Stats. 1994) authorized limited liability companies for the first time to organize and register in the state. The Legislature was advised that an increasing number of businesses would organize as limited liability companies rather than corporations, resulting in a decrease in income and franchise tax revenue. To offset the loss in tax revenue, certain limited liability companies are required to pay an annual fee based on total income from all sources reportable to the state.

(b) The Legislature finds and declares that its intent in adopting Section 17942 was to ensure that limited liability companies pay a fair and appropriate amount to the State of California, consistent with constitutional limits, and the changes made by this act with respect to Section 17942 serve a public purpose and are in furtherance of the public interest in the fair taxation of limited liability companies doing business in the state by applying the apportionment and allocation provisions to total income for purposes of determining the amount of the limited liability company fee.

(c) The Legislature further finds and declares that this act serves a public purpose and sound tax policy by affording equitable tax treatment to many taxpayers doing business in this state with the expectation of paying a limited liability company fee that is relative to the level of activity in the state.

SEC. 2. Section 17942 of the Revenue and Taxation Code is amended to read:

17942. (a) In addition to the tax imposed under Section 17941, every limited liability company subject to tax under Section 17941 shall pay annually to this state a fee equal to:

(1) Nine hundred dollars (\$900), if the total income from all sources derived from or attributable to this state for the taxable year is two hundred fifty thousand dollars (\$250,000) or more, but less than five hundred thousand dollars (\$500,000).

(2) Two thousand five hundred dollars (\$2,500), if the total income from all sources derived from or attributable to this state for the taxable year is five hundred thousand dollars (\$500,000) or more, but less than one million dollars (\$1,000,000).

(3) Six thousand dollars (\$6,000), if the total income from all sources derived from or attributable to this state for the taxable year is one million dollars (\$1,000,000) or more, but less than five million dollars (\$5,000,000).

(4) Eleven thousand seven hundred ninety dollars (\$11,790), if the total income from all sources derived from or attributable to this state for the taxable year is five million dollars (\$5,000,000) or more.

(b) (1) (A) For purposes of this section, “total income from all sources derived from or attributable to this state” means gross income, as defined in Section 24271, plus the cost of goods sold that are paid or incurred in connection with the trade or business of the taxpayer. However, “total income from all sources derived from or attributable to this state” shall not include allocation or attribution of income or gain or distributions made to a limited liability company in its capacity as a member of, or holder of an economic interest in, another limited liability company if the allocation or attribution of income or gain or distributions are directly or indirectly attributable to income that is subject to the payment of the fee described in this section.

(B) For purposes of this section, “total income from all sources derived from or attributable to this state” shall be determined using the rules for assigning sales under Sections 25135 and 25136 and the regulations thereunder, as modified by regulations under Section 25137, other than those provisions that exclude receipts from the sales factor.

(2) In the event a taxpayer is a commonly controlled limited liability company, the total income from all sources derived from or attributable to this state, taking into account any election under

Section 25110, may be determined by the Franchise Tax Board to be the total income of all the commonly controlled limited liability company members if it determines that multiple limited liability companies were formed for the primary purpose of reducing fees payable under this section. A determination by the Franchise Tax Board under this subdivision may only be made with respect to one limited liability company in a commonly controlled group. However, each commonly controlled limited liability company shall be jointly and severally liable for the fee. For purposes of this section, commonly controlled limited liability companies shall include the taxpayer and any other partnership or limited liability company doing business (as defined in Section 23101) in this state and required to file a return under Section 18633 or 18633.5, in which the same persons own, directly or indirectly, more than 50 percent of the capital interests or profits interests.

(c) The fee assessed under this section shall be due and payable on the date the return of the limited liability company is required to be filed under Section 18633.5, shall be collected and refunded in the same manner as the taxes imposed by this part, and shall be subject to interest and applicable penalties.

SEC. 3. Section 19394 is added to the Revenue and Taxation Code, to read:

19394. If the fee provided under Section 17942 is finally adjudged to be discriminatory or unfairly apportioned under the California Constitution, or the laws or the Constitution of the United States, the fee of a disfavored taxpayer that files, or has filed, a timely claim for refund within the period allowed by this part asserting discrimination or unfair apportionment shall be recomputed by the Franchise Tax Board for the taxable year in question, as of the time of allowance of the recomputation, only to the extent necessary to remedy the discrimination or unfair apportionment that is not otherwise relieved by Section 19393 and the amount of the fee, as originally computed, shall be subject to the provisions hereof relating to original computations.

SEC. 4. (a) The Legislature is aware of pending litigation challenging the validity of the fee imposed pursuant to Section 17942 of the Revenue and Taxation Code.

(b) The amendments made by Section 2 of this act to Section 17942 of the Revenue and Taxation Code, if enacted, shall apply to taxable years beginning on and after January 1, 2007.

(c) Section 19394 of the Revenue and Taxation Code, as added by Section 3 of this act, shall apply to suits for refunds filed on or after the date of enactment of this act and suits for refunds filed before that date that are not final as of that date.

(d) Refunds of fees payable as a result of the litigation described in subdivision (a) shall be limited to the amount by which the fee paid, and any interest assessed thereon, exceeds the amount that would have been assessed if the fee had been computed in accordance with subparagraph (B) of paragraph (1) of subdivision (b) of Section 17942 of the Revenue and Taxation Code, as added by the amendments to that section made by Section 2 of this act.

(e) It is the intent of the Legislature that no inference be drawn in connection with the amendments made by this act to Section 17942 of the Revenue and Taxation Code for any taxable year beginning before January 1, 2007.

SEC. 5. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect.

Approved _____, 2007

Governor